

41.
[December 19. 1743.]

3
INFORMATION

F O R

Sir WILLIAM COCKBURN of that-
Ilk, and the other Creditors of *Lang-*
toun, Defenders,

A G A I N S T

Sir ALEXANDER COCKBURN Heir apparent of *Lang-*
toun, Pursuer.



I R *Alexander Cockburn* has brought an Action against *Sir William Cockburn*, who has Right by Disposition to the Office of Principal-Usher to His Majesty, and the Fees and Salaries there- to belonging, and against the other Creditors who have adjudged the Premisses from *Sir A-* *lexander's* Ancestors; concluding, That it should be found and declared, "That he, by his Right of Blood, has the only " Right and Title to the said Office and Fees, without being " obliged to serve himself Heir to his Predecessors who stood " last inest, or to represent them passive in any other Way." Which Points of Declarator, with the Objections moved by the Defenders, and Arguments had thereupon, my Lord *Ar-* *niston*, Ordinary in the Cause, has taken to report.

As the Question is new, it will be requisite, for the deter- mining of it, with the greater Ease and Perspicuity, that the Titles, by which this Office has been held by the Family of
Lang-

Langtoun for near four Centuries, be set forth; and they stand thus.

15th Feb.

1571.

8th March

1593.

King *Robert* the 2d. by a Charter, which was afterwards ratified and confirmed by King *Robert* the 3d. did grant to *Alexander Cockburn Esq;* the Baronies of *Boltoun, Carridden,* and *Langtoun, Itaque quod dictus Alexander, hæredes vel assignati sui intersit vel intersint, tres sectas capitales, viz. sectam itineris justiciarii tent. infra, vicecomitat. de Berwick, sectam itineris justiciarii tent. apud Edinburgh, et Parliamentum tent. apud Scoon, et quod dictus Alexander, vel hæredes sint principales ostiarii nostri, ad nostra Parliamenta, generalia concilia, et festa, capiendo de nobis et successoribus nostris per dictum tempus liberationem, pro duobus armigeris, duobus arcu tenentibus, cum gladiferis, et equis pertinentibus iisdem, reddendo inde annuatim par calcarium deauratorum, &c.*

23th Feb.

1509.

By a Charter from King *James IV.* proceeding upon the Resignation of *William Cockburn* of *Langtoun*, the Baronies of *Langtoun*, and *Carridden*, with the Office of Usher, and Fees thereto belonging, are granted to *Alexander Cockburn*, Son of the Resigner; and for the good Services done, and to be done, by the said *Alexander*, and his Heirs, the King unites the two Baronies into one: And further annexes, unites and incorporates *dictum officium ostiarii, cum libertatibus et divoriis ejusdem, ut sit dependen. dict. Baronie et idem semper hæreat, comiteur, et sequatur eandem in perpetuum*, To be holden by the said *Alexander*, and his Heirs, of His Majesty and his Successors *in feodo et hæreditate, ac libera Baronia, pro omni tempore futuro*, Reserving *William* the Father, his Liferent Right of the same.

9th Jan.

1540.

Alexander was succeeded by *James*, who resigned the Premises in Favours of *Alexander* his Son; and thereupon, there is a Charter to the said *Alexander*, his Heirs and Assignies whatsoever, containing a *Novodamus* in the same Terms, and a new Erection of the Lands, and Office of Usher, with the Fees thereof, into the Barony of *Langtoun*.

By

By a subsequent Charter, The Lands and Barony of *Langtoun*, and Office of Principal-Usher, with the Fees and Casualties thereof, are disposed to *William Cockburn* of *Langtoun*, and his Heirs-Male whatsoever; who, upon his own Resignation, under the Title of Sir *William Cockburn* of *Langtoun*, obtains a Charter, containing a *Novodamus* to him, and the Heirs-Male of his Body; which failing, to Sir *Richard Cockburn* of *Clerkingtoun*, and the Heirs-Male of his Body; which failing, to the said Sir *William*, his Heirs-Male whatsoever.

11th Nov.
1595.

1609.

As the Creditors have not had Access to the Charter-Chest of *Langtoun*, they cannot affirm with Certainty, whether Sir *William* who gets the next Charter of the Premises, is the same Person who had the immediate preceeding Charter: But so it is, that by this last Charter it does appear, that Sir *William Cockburn* of *Langtoun*, had made a Liferent-Grant of his Office in Favours of *James Maxwell* of *Inverwick*, and *William Maxwell* of *Kirkhouse*, and to the longest Liver; for when, by this Charter, the Office of Usher, with the Fees and Casualties thereof, particularly a yearly Fee of 400 *l. Scots*, are granted to Sir *William Cockburn* of *Langtoun*, and his Heirs-Male and Assignies whatsoever; there is added, *Reservata omnimodo libertate, et plena potestate, Jacobo Maxwell de Inverwick, et Willielmo Maxwell de Kirkhouse, eorumque alteri diutius viventi, dict. officium tanquam conjunctos ostiarios, cum omnibus privilegiis, feodis et divoris, dict. officio spectantibus, secundum eorum jura separata, et possessionem durant. omnibus eorum vitæ diebus, aut cujuscumque eorum.*

1642.

After the Death of *William Maxwell* of *Kirkhouse*, on some Bargain betwixt Sir *William Cockburn*, and *Robert Cunningham*, Brother of the Earl of *Glencairn*; the said *Robert* is substituted in Place of *William Maxwell*, and a new Charter obtained in Favours of Sir *William Cockburn*, and his Heirs-Male and Assignies whatsoever in Fee, and in Liferent to the said *Robert Cunningham*, reserving *James Maxwell* of *Inverwick* his Joint-Liferent.

7th Jan.
1647.

But

Aug. 10th
1660. But upon his Death, there is a Liferent-Grant under the Great Seal of the Office, with 50 *l. Sterling* Salary, and other Fees and Casualties in Favours of *Robert Cunningham* only.

10th May
1662. By a subsequent Charter, all the former Grants of the Barony of *Langtoun*, and Offices, are ratified and confirmed, with a *Novodamus* of the Office of Usher, to Sir *Archibald Cockburn* of *Langtoun*, and his Heirs-Male and Assignies whatsoever; and the Lands and Office are of new erected into a Barony, to be called the Barony of *Langtoun*, reserving the Right of the said Office, to the said *Robert Cunningham*, during his Life.

15th Feb.
1674. Upon the Dimission and Renunciation of the said *Robert Cunningham*, all the former Grants and Charters of the Barony of *Langtoun*, to which the Office of Usher was annexed, are ratified and confirmed by Charter under the Great Seal, which contains a *Novodamus* in Favours of Sir *Archibald Cockburn*, and his Heirs-Male and Assignies whatsoever, with the hails Fees and Casualties; and particularly a Fee of 250 *l. Sterling* yearly, for ever; and the said Lands and Office, with the Fees and Casualties thereto belonging, are of new erected into a Barony.

1681. By Act of Parliament, the former Grants, Union and Erection of the Lands of *Langtoun*, and the foresaid Office into a Barony; and particularly the Charter 1674, to Sir *Alexander*, his Heirs-Male and Assignies whatsoever, are ratified and confirmed.

1688. And upon the Resignation of Sir *Archibald*, in Favours of *Archibald* his Son, there is a Charter under the Great Seal of the Lands and Barony of *Langtoun*, Office of Usher, Fees and Casualties thereto belonging, to the said *Archibald*, and his Heirs-Male and Assignies whatsoever, reserving the Father's Liferent, and a Faculty to burden the Premises with 50000 Merks.

Sir *James Cockburn* of that-Ilk, and Sir *William* his Son, being engaged in great Debts for the Family of *Langtoun*, Sir
Archibald

(5)

Archibald Cockburn of *Langtoun* dispones the Barony of *Langtoun*, and Office of Usher, with the Fees and Salaries, in Favours of *Sir William Cockburn*, for Relief of the Debts in which he and his Father were engaged, whereupon they are infest; and the Affairs of the Family of *Langtoun* turning into Disorder, the Creditors adjudged the Premises; and, in a Competition which arose before the Lords, touching the fore-said Office and Salary, betwixt *Langtoun* and his Creditors on the one Part, and *Sir William Cockburn* and his Creditors on the other, *Sir William* and his Father are preferred upon the Disposition in his Favours; which Decreet of Preference is extracted and produced in this Process.

14th Feb.
1690.19. Feb.
1690.

1691.

30th July
1692.

Sir Alexander Cockburn, last deceased, is served and retoured Heir to his Brother *Sir Archibald* in the said Lands and Barony of *Langtoun*, Office of Usher, Salary of 250 £. and haill other Fees and Casualties thereto belonging; but, notwithstanding of this Service and Retour, *Sir William* has continued, in Virtue of his Decreet of Preference, in Possession of the Salary, for Relief of his Engagements, down to this Day.

11th Feb.
1711.

From this State of the Rights and Titles your Lordships have observed, That originally the Exercise of this Office of Usher was, in Effect, a Part of the Service due to the Sovereign for the Baronies of *Boltoun*, *Langtoun* and *Cariddon*, as immediately subjoined to the *tres sectas curiarum*; and, in this View, that Office was so far from being *extra commercium* that it behoved necessarily to pass with the Baronies into whose Hands soever they should come.

2do, Tho', by the After-Charters, the Office is granted, in Fee and Heritage, in the same Manner as the Feudal-Right of the Baronies is constituted, with a *Reddendo* for the whole: Yet still it is annexed and incorporated with the Barony of *Langtoun*; and therefore it might be transmitted from Hand to Hand, in the same Way and Manner as the Right to the Barony itself.

310, The Grant of the Office, as well as of the Lands, is in Fee simple to Heirs and Assignies whatsoever in one of the Charters: In others to Heirs-male of the Fiar's Body; which failing, to an extraneous Family, and the Heirs-male of their Bodies; which failing, to the Heirs-male whatsoever of the Person in whose Favours the Charter is granted: And in others the Fee is conceived in Favours of the Heirs-male, and Assignies whatsoever, in the same Way as the Barony, and consequently transmissible in the same Manner.

410, The Fee is granted with the Reservation of the Life-rent of the Possessor; and there are Life-rents of extraneous Persons constituted upon it by separate Rights flowing from the Fiar; and as the Office has thus past by Deed and Infeudment, as well as the Lands; so likewise it has been taken up by Service and Retour, as other Fees or Rights of Property: And that the Nature of this Office should now be so much altered, as to be exempted from Commerce, and not transmissible in the same Way as other Rights of Property, is not easy to be understood.

The Pursuer, however, insists, "That where a Trust in a single Person is understood to be committed, it is, in the Nature of the Thing, not alienable, or *in commercio*; it is a personal Function, *ubi industria personae eligitur*, and therefore can be exercised by none but the Person chosen: It is so in Offices during Life; and Offices conferred upon one and the Heirs-male of his Body, is, in Effect, but a Life-rent continued to the Son after the Decease of the Father, and consequently no more alienable by the Son than it was by the Father while he continued in Possession: Neither does it alter the Case, that the Reversion is to Heirs-male, that Word being only used *designative*, and not to lay the eldest Son under any Necessity of taking up the Grant by Service and Retour, as Heir to the Predecessor, who is supposed to have had in him no more than a Life-rent; but the Case is the same as if two or more Persons were *nominatim* called in a

" Grant

“ Grant of an Office, the one upon the Decease of the other:
 “ Upon the Decease of the first, the second takes up the Office;
 “ not in the Right of his Predecessor, but in the Title of the
 “ Patent to himself, and therefore does in nowise represent his
 “ Predecessor *passive*, so as to be subject to his Debts and
 “ Deeds. This holds likewise in Dignities, such as a Peerage,
 “ and *a fortiori* must hold in Offices about the Person of the
 “ King, which carry Dignity along with them.”

Dignities of Peerage, which have nothing patrimonial in them, ennoble the Blood, and, for this Reason, are carried along with the Blood from Ancestor to Successor without any Solemnity requisite in Law: But the Defenders cannot admit that the Office of *Ostiarium* or Door-keeper, with Fees and Salaries annexed, carries any Dignity along with it, ennobling the Blood, either with Respect to the first Grantee, or to his Heirs and Successors; and whether the Grant be for Life only, as all Feus originally were, or to Heirs-male and Assignies whatsoever, or in Fee simple to Heirs and Assignies whatsoever, all of them, by the more modern Feudal-Law and Custom, are patrimonial Feus, alienable and affectable by Diligence of Creditors, as Lands and other Feudal-Subjects are, and that too, not only by the Nature of the Grant, vesting the Property in the Grantee and his Heirs, but by the express *Quality* of it, understood by the Prince the Granter, and the Vassal the Receiver, by the Words *to Assignies whatsoever*.

If this Distinction betwixt Dignities and patrimonial Offices requires to be confirmed, let it be observed, That in Dignities ennobling the Blood the Descendants of the Person first ennobled, *only* take the Dignity in Virtue of their Blood; but Collaterals, tho' Heirs, have nothing to do with it: But in Grants of patrimonial Offices to Heirs and Assignies whatsoever, or to Heirs-male and Assignies whatsoever, as in the present Case, Collaterals who can qualify themselves Heirs of the Grantee will, unquestionably, succeed. And, altho', by Reason of the Prero-

gative of the Crown, it might be disputed, whether, in the Grant of a Peerage to a Person and his Heirs-male whatsoever, the Collaterals might succeed? It is sufficient to support the Observation, that no such Grant ever did appear, unless where the Collaterals in the Patent are expressly called and ennobled, which has indeed been done, but would have been unnecessary if a Patent of Peerage, or such Dignity, could, by Law, have been limited to the Grantee, and his Heirs-male in general.

That the Grant of this Office, which requires an Aptitude in the Grantee to exerce, and that therefore such Person and his Heirs, who are supposed to be called *designative*, and not as Heirs *actu*, ought to be constructed only simple Liferenters, each succeeding in their own Right, and not in that of their Predecessors, is without any Foundation in Law, so far as the Defenders can discover.

The Office is granted in the same Words, and under the same Limitation as the Baronies; yea the Office, by the express Words of the Grant, is expressly united and incorporated with the Barony of *Langton*, to remain inseparably therewith in all Time coming, and so is a Part of that Barony, as the Baronies of *Boltoun* and *Carliden* formerly were, which are now alienated and disposed of as any Part of a Barony may be, where in the Grant there is no Limitation to the contrary; and therefore why this Office, as a Part of the Barony, might not likewise be alienated, and consequently carried by the Diligence of the Creditors, does not so readily appear.

In the Origin of Feus, when these were granted only for Life, there is, no doubt, there was a Choice of the Persons fit for Military Service, if the Grant was under that Tenure, or of Offices, such as *Guardii* & *Gastaldæ*: But when the Nature of Feus came to be so far altered, as that they were descendable to Heirs, and thereafter to Heirs and Assignies; it is inconceivable, how the Aptitude of the Persons to succeed in such Offices could be under Consideration, and far less in this

this than in any other Office, where nothing else is requisite, but to open and shut a Door, or to walk before the Sovereign in his Processions : So that whether this Grant shall be considered as purely heritable, descendable to none but such as can take as Heirs, or if it shall only be constructed a perpetual Life-rent-Grant ; this Choice or Aptitude of the Person to officiate, so much insisted on by the Pursuer, is quite out of the Case ; altho', at the same Time, the Defenders will be allowed to say, That this Notion of a perpetual Life-rent-Grant ; so as that each Successor shall take up the Subject in his own Right, and not in the Right of his Predecessors, has no Authority from the Law of *Scotland*, nor from the Tenor of the Charters, by which the Subject is granted, nor from the Practice of the Pursuer's Ancestors in this particular Case.

The Defenders will not dissemble, but that some of the ancient Doctors, who wrote upon Feus, because every Body allowed them to go under the Name of *beneficia*, had this Notion of a perpetual Life-rent-Right in the Vassal and his Heirs and Successors, so as to reject the received Distinction of the *Dominium directum* in the Superior, and the *Dominium utile* in the Vassal ; but all the modern Authors concur to explode this Notion. And the learned *Craig*, Page 59, of the late Edition ; after having observed, That, by the modern Stiles of Feus, which confers the Property, the Notion of a Benefice is quite altered, says, *Quis enim Rollonem Ducem Normaniæ, cum in Normania nomine feudi investitus fuit a Carolo, simplicem tantum usumfructum accepisse dicet, aut presentem Ducem Saxonie, Marchionem Brandenburgensem, Palatinum Comitem tantum esse usufructuarios suarum ditionum ? Nostri sane insanirent, si eos non esse Dominos suorum prædiorum, sed tantum usufructuarios diceremus.*

But that, which in the present Case explodes altogether the Notion of a perpetual Life-rent in the Successors of the first Vassal is an Observation of the same learned Author from the known Principles of Law, That a Life-rent cannot be constituted

tuted upon a Liferent ; so that if Feus were only to be considered as perpetual Liferents in the Person of the Possessor, he could not constitute a Liferent upon the Feu, *cum effectu*, contrary to the constant Law and Practice in such Cases. And here your Lordships have observed, That with respect to this Office, and the Fees and Profits thereto belonging, oftner than once the Fee and Inheritance has been conveyed to the apparent Heir with the Reservation of the Liferent to the Resigner, and Liferents have been constituted upon the Office (such as in the Case of Sir *James Maxwell* of *Inverwick* and *Robert Cunninghame*) while the Fee remained with the former Possessor and his Heirs.

It is another Notion equally untenible in Law, "That the Heirs-Male by the Grants are only called *designative*, and not as *heredes sui & necessarii* of the Law." My Lord *Dirleton*, *voce feodum pecunie & nominum*, *Quest. 13. & 14.* states the Distinction, and gives the Characteristick when a Person is called to the Succession as Heir only *habitu, & designative* ; That he must be the Heir of another Person, than him to whose Succession he is called ; as when *Sempronius*, failing Heirs of his own Body, calls to his Succession the Heirs of another Person, who probably may not be so much as of Blood to the Deviser of the Settlement ; it is sufficient to entitle to the Succession him, who *might* be Heir of that third Party, tho' he was not actually served and retoured as his Heir ; the Designation points out the Person ; and upon that Character, without further, he may be served to the Deviser : But then he is only Heir of Provision, but not universal Heir, or Heir at Law. This Character will, notwithstanding of the Provision, still remain with the nearest and lawful Heir, who will necessarily succeed in all such other Subjects, as may be limited to the Predecessor and his Heirs in general, or to Heirs-male, who may indeed abstain, if they will, but they cannot effectually take without Service and Retour ; or if cloathed with that Character they do take, neglecting a Service, they are liable

passive.

passive for all their Predecessor's Debts and Deeds. And such is the present Case.

From the Argument, so far as it has proceeded, it will be unnecessary to enquire, Whether an Office for Life may be affectable by the Diligence of Creditors; for, tho' it is not properly adjudgable, as not descending to Heirs, yet some of our Lawyers, of no small Note, have doubted if such Offices may not fall under Liferent-Escheat: But as it has appeared that the Subject in Question is no Office *simply* for Life, but heritable to Heirs and Assignies, the Defenders can see no Reason to doubt but that it can never be taken up by the Heir without a Service and Retour to his Predecessor, or incurring the passive Title of *Behaviour*; or that it is not transmissible by voluntary Deed, or adjudgable by Creditors in like Manner as other patrimonial Feudal-Rights of Property; of which there are almost as many Instances as we have heritable Offices in the Kingdom. The heritable Office of Justiciar over all Scotland, and of heritable Master of the Household, has been taken up in the Way of Service and Retour by the Heirs of the Family of *Argyle*; and so has the heritable Constabulary of the Castle of *Blackness*, the Office of heritable Keeper of the Palace of *Linlithgow*, and of heritable Sheriff of the County of *Stirling*, by the Heirs of the Family of *Linlithgow*; the heritable Office of Keeper of the Palace of *Holy-rood-house* by the Family of *Hamilton* for many Generations; and, altho' the heritable Offices of High Admiral, and High Chamberlain of *Scotland*, might be thought Jewels of the Crown, and more easily resumable by the Crown, or devolving upon it, than other Offices, yet the same having been given off heritably to the Duke of *Lenox* and his Heirs-male, upon Failure thereof in the Year 1672, by the Death of *Ludovick* Duke of *Lenox*, it was the Opinion of all the Lawyers at the Time, That the same could not be taken up by King *Charles II.* either in Right of Blood or *jure coronæ*, but that he behoved to be served and retoured Heir in these Offices *tanquam privatus* to him who died last vested,

vested, as of Fee; and accordingly in the Year 1681 he was served Heir before the Macers, the Chancellor and fourteen Lords of the Session being the Inquest of the Service, which stands retoured upon Record; and, upon that Title, he disposed the same to the Predecessor of the Duke of *Lenox* and *Richmond* who now is, who again resigned the same to the Crown *ad perpetuam remanentiam* in the Reign of *Queen Anne*.

So likewise the heritable Sheriffships through *Scotland*, vested in private Families, have past from Hand to Hand by Alienation and Purchase. The heritable Sheriffship of the County of *Linlithgow* was purchased by Sir *Walter Seton*, and his Predecessors, from *Drummond* of *Midhope*, who had it from the Family of *Abercorn*; and, as Sir *Walter* had purchased it, so he sold it again to the Family of *Hopetoun*, who enjoy it at this Day: And the heritable Sheriffship of *Murray* was in Like-manner conveyed by the Family of *Westfield*, heritably to the Family of *Moray*: And when King *Charles I.* intended to have all such heritable Offices, with Jurisdiction, lodged in the Crown, he fairly purchased them from the Proprietars, and had Dispositions from them with Procuratories to resign *ad remanentiam*; upon which Resignations were accordingly made by severals, tho' others chused to retain the Offices, and are possessed of them at this Time.

So likewise in other Offices, such as Coroners of Counties, Constables of Castles, Keepers of Forrests, heritable Baillies of Ecclesiastical Regalities, which were saved from the Act of Annexation, and even heritable Porters; there are Instances, which, because they are so frequent, need not be resumed, where all of them have been transmitted from Predecessor to Successor by Service and Retour, and have been alienated by the Possessors, and adjudged from them by their Creditors. And why this Office in dispute, which is granted to Heirs and Assignies, should be the only one excepted from this general Practice and Sense of the Nation, where it has been previously taken

taken up by Service, and resigned in the Sovereign's Hand, as other Fees, for a new Grant which has been obtained, cannot be understood.

The Pursuer urges, "That there is not a Form of Diligence in our Law whereby an heretable Office can be apprised or adjudged by Creditors from the Fiar or Possessor: The Statute in *James III's* Time, introductory of Apprisings, concerns only Lands; the Apprifer is to pay a Year's Rent to the Superior for his Entry, and the Superior may retain the Land to himself, paying the Creditor. The after Acts, touching Apprisings, in Like-manner respect only Lands, and the Intromissions with the Rents thereof, by the Possessor accountable to the Debitor, &c. Neither in the Multiplicity of Adjudgers, all *pari passu*, as being within Year and Day, could all serve in the Office, and consequently not any one more as the others, the Subject being indivisible."

It is a Mistake that the Statute in *James III's* Time was the first which introduced Apprisings amongst us, since these are mentioned in the Statutes of *Alexander* and *Robert I.* And, tho' it may be true that all of these Statutes concern only the Apprising of Lands, as does the ancient Statute touching Death-bed, and touching the Division of the Succession betwixt Heirs of Line, and Heirs of Conquest; yet, by constant Custom and Practice, all these Statutes have been extended to every other heretable Right, nay even to Heirship-Moveables, as our Lawyers have observed, particularly my Lord *Stair* upon this Statute of *James III.* in the last Lines of Page 388. And so likewise upon the other Statutes, which Observations your Lordships have followed in your *Practicks*: And it has been already shown, that this is truly and properly an heretable Right of Property and Fee, carrying with it a patrimonial Interest.

It is nothing to the Purpose that the Office is an individual Subject, for so is a Superiority, and so is a Mill, a Patronage, and several other Particulars in our Law, which, tho' admit-

ting of no Division, are yet appraisable and adjudgable; and the true Answer to all these imaginary Difficulties is, That now when the whole Estate of a common Debitor is carried off by the Diligence of Creditors, the Law appoints it to be roused, and sold for the Payment of the Creditors, whereby the Price can be easily divided, tho' there was nothing else to be sold but the Office itself, with the Salaries and Profits thereto annexed: But as this Office is incorporated with the Barony of *Langtoun*, and carried by the same voluntary and legal Rights, if the Barony is carried by Deeds and Diligences, the Offices and Profits thereto annexed must go alongst, and be the Subject of Preference among the Creditors who are carrying on the Ranking, 2nd, when that is finished, the Subject of the Sale; as your Lordships have, in Effect, already found.

For, in the original Ranking and Sale, which, sometime after *Langtoun's* Bankruptcy, and in which a Competition amongst all the Creditors was carried on against the Subject of the Sale, by the several Creditors who had affected the same; *Thomas Edgar* Surgeon in *Edinburgh* having got a Right to the said Office, Profits and Emoluments thereof in the Year 1690, from *Archibald Cockburn*, younger of *Langtoun*, who had the Barony of *Langtoun* and the Office disposed to him in his Contract of Marriage, whereupon he was infest by a Charter under the Great Seal, did intimate his Right to *Duncan Ronald* Receiver of the Fees and Emoluments of the said Office; and, upon this, stept in and compeated, and obtained Decreet of Preference in the 1691 against several Creditors of *Langtoun* competing with him: But Sir *James* and Sir *William Cockburns*, who had likewise got a Right to the said Lands and Baronies, with the Office of Usher, after the Right in Favours of *Thomas Edgar*, having renewed the Competition betwixt him and *Langtoun*, Elder and Younger, and their Creditors, the several Rights to the Lands, Baronies and Office, are produced, and disputed upon by the respective Procurators compearing, whereupon a new Decreet of Preference in

in the Year 1692 is pronounced and extracted, preferring *Thomas Edgar* upon his Right for his Debt of 2000 Merks out of the first and readiest of the Profits, in the Hands of *Duncan Ronald* the Receiver, and Sir *James* and Sir *William Cockburn's secundo loco* to the other Creditors who were Annualrenters, whose Infestment did not contain the Office, and, in Virtue of this Decreet of Preference, Sir *William* has continued to intromit with the Salary and Profits of the said Office in Virtue of his voluntary Right of Relief ever since.

It is true, the Pursuer observes, That the Point now in Question, was not under Dispute; all the contending Parties, as was their Interest, agreeing in this Point, That the Office and Emoluments, were transmissible by Deed, and affectable by Diligence.

But if it had been agreeable to the Law of *Scotland*, that such Offices were neither transmissible by voluntary Conveyance, nor affectable by Diligence, it was *pars judicis* to take Notice of it: But this was neither done by the Judges, nor by the ablest Lawyers at the Time, who appeared in the Competition, which is a strong Evidence, at least, that in the Sense and Opinion of those who were most versant in the Laws of the Land, such Subjects were to be governed by the same Rules of Preference, as obtained with Respect to other heretable Rights. And to this Practick may be added one of a later Date, touching the Office of King's Printer for a Term of Years, which your Lordships have found both assignable and adjudgable.

It has been further argued by the Pursuer, " That if this
 " Office *ex sua natura* is not alienable, and affectable by the
 " Diligence of Creditors, when limited simply to the Grantee,
 " and his Heirs-Male, the Adjection of the Words, *to Assignies*
 " *whatsoever*, can make no Alteration in the Case; for this
 " did not happen till after the Office was annexed to, and in-
 " corporated with the Barony; and as it is usual to adject Af-
 " signies in the last Termination of the Grants of Land-Rights;
 " this

“ this Adjection must be constructed to respect the Right of
 “ the Lands, and not of the Office; especially, that there can
 “ be no proper Union betwixt a personal Privilege, such as an
 “ Office, and a Parcel of Land; and as this Union therefore
 “ can have no Effect to alter the Nature of the respective
 “ Rights pretended to be united, it is good for nothing but to
 “ facilitate the Transmission, but not at all to make the Office
 “ patrimonial, or to bring it *in commercio*.”

But it has been already observed, That heretable Offices are as much the Subject of Feus, as Lands, or other patrimonial Rights; and therefore, there can be no Incongruity in the Union, or in the constructing the Words, *Assignies whatsoever*, to refer to the Title of the Office, as well as of the Lands, without occasioning any Alteration in the Nature of the Rights; and if these Words have the Influence to facilitate the Transmission of the Subjects united, as the Pursuer seems to admit, they are at least transmissible by Deed, from one Hand to another, and consequently affectable by the Diligence of Creditors; for as to the Transmission from Ancestor to Heir, this would have been equally easy, supposing, that the Words *Assignies whatsoever* had not been added; and therefore *ex concessis* the heretable Right of the Office must be patrimonial, and *in commercio*.

My Lord Dirleton's Doubt, stated *sub voce*, Title of Honour, “ What comes of the Title of Honour, when Lands and “ Baronies are erected *in Comitatum* with the Title, when such “ Lands are disposed or evicted?” Has nothing to do in the present Question, no more than Sir James Stewart's Answer, who is of Opinion, that in such a Case, the Title will not be conveyed, but will remain, and follow the Blood.

For this is the very Reason assigned above by the Defenders, of the Distinction betwixt a mere Dignity, and a patrimonial Office given in Feu to Heirs and Assignies; and as we have no *feudum nobile* in this Part of the united Kingdom, ennobling the Possessor whoever he is, and but one in *England*,
 the

the Castle and Manour of *Arundel*, now subjected to Limitations; the Opinion of the Lawyers brought for the Pursuer, makes nothing in Support of his Argument; neither is it much to the Purpose, tho' great Pains has been taken in the Minutes to labour the Argument, "That the Words "*Assignies whatsoever* cannot make that to be in *com-mercio*, which was not so of its own Nature." And my Lord *Dirleton's* Opinion, *Quest. 6th voce de Resignationibus*, proves only this, That a Superior cannot be forced to accept of a Resignation, in order for a new Grant to a singular Successor; for this is common to all Feus, whether of Lands or Offices; and therefore can never prove that Offices are not in *commercio*, when given out in Feu, and passing by Infeftment: But every Body knows, that when the Superior is recusant in such a Case, there is another Method in Law for forcing Subject-Superiors, to convey the Subjects in Favours of a singular Successor: And such is the Bounty of the Crown, that no Grants are refused to singular Successors either upon Resignations, of which your Lordships perceive severals have past with Respect to this very Office, or to lawful Creditors, when the Law in Course of Adjudication has entitled them to the Right.

But, supposing, that the Pursuer's Argument should hold, That the Termination to *Assignies whatsoever*, gave no further Right to the Vassal than he previously had, supposing the Grant to have been to him and his Heirs; it does not appear that the Pursuer is much advanced in his Purpose? For where the absolute Property is in the Vassal, and his Heirs without any Irritant, Resolutive, or Prohibitive Clause expressed in the Deed, or implied from a Ward-Tenure, the Vassal may alienate, and the Subject may be evicted by his Creditors, in Course of their lawful Diligence. However, the Pursuer will thus far admit, that since the late Act of Parliament, made long after my Lord *Dirleton's* Time, whereby Procuratories and

Precepts may be assigned, the Termination to Heirs and Assignies whatsoever, is not without its Effect.

Upon the whole Matter, as the Law of no Nation has been so favourable to Creditors for Payment of their true and lawful Debts, as the Law of Scotland; and as thereby proper Diligence and Proceffes are provided for affecting, by the Creditors, every patrimonial Estate belonging to their Debtor; and as for this Reason, your Lordships have lately found, That the Grant of an Office for a Term of Years, the Profits whereof, depended chiefly upon the Skill and Industry of the Grantee, was *assignable* and *adjudgable*; it is humbly hop'd, there will be little Difficulty in giving the same Judgment, with Respect to this heretable Office, which in Effect is *feudal* in the same Way as Lands, and altogether patrimonial.

In Respect whereof, &c.

JA. GARHAM.

